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9 **UNITED STATES DISTRICT COURT**
10 **SOUTHERN DISTRICT OF CALIFORNIA**
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12 MEL M. MARIN,

13 Plaintiff,

14 vs.

14 STEPHEN SHAW,

15 Defendant.

CASE NO. 01CV1403WQH

ORDER

16
17 HAYES, Judge:

18 The matter before the Court is the motion for summary judgment (#170) or, in the
19 alternative, for summary adjudication of claims by the remaining Defendant Stephen Shaw.

20 **BACKGROUND**

21 On July 31, 2001, Plaintiff Mel M. Marin filed a Complaint for Malpractice and Breach
22 of Fiduciary Duty naming a single Defendant Stephen Shaw. Plaintiff alleged that he met with
23 Shaw for the purpose of retaining Defendant Shaw to represent him in an ongoing action in
24 state court, and that Plaintiff confided information during the meeting to Defendant Shaw not
25 generally known in the legal field or in the community at large. The Complaint alleged that
26 Defendant Shaw declined to represent Plaintiff in any action because of an inability to pay and
27 took the information held in confidence and used that information against Plaintiff in an
28 unrelated state court action to engineer the dismissal of that action against Plaintiff. Complaint

1 at pages 2 and 3.

2 On February 14, 2003, Defendant Stephen Shaw represented by Samy Henein of
3 Suppa, Trucchi & Henein, LLP filed an Answer to Plaintiff's Complaint denying each and
4 every allegation of the Complaint and setting forth a number of affirmative defenses.

5 On October 10, 2003, Plaintiff filed a First Amended Complaint naming three
6 Defendants as follows: 1) Stephen Shaw; 2) Suppa, Trucchi & Henein, LLP, a California
7 Partnership; and 3) the United States Army.

8 On October 4, 2004, the Court granted a motion by the Defendant United States Army
9 to dismiss for improper service and dismissed the United States Army from the action without
10 prejudice.

11 On February 8, 2005, Plaintiff filed a Second Amended Complaint naming four
12 Defendants as follows: 1) Stephen Shaw; 2) Suppa, Trucchi & Henein, LLP, a California
13 Partnership; 3) the Department of Defense; and 4) the Secretary of the Department of Defense.

14 On March 9, 2006, this Court granted a motion by the Department of Defense and the
15 Secretary of the Department of Defense and dismissed all claims in the Second Amended
16 Complaint against the Department of Defense and the Secretary of the Department of Defense.

17 On March 30, 2006, this Court ordered Plaintiff to show cause why this action should
18 not be dismissed for failure to file provide proof of service of the amended complaints upon
19 Defendant Shaw and failure to serve any complaint upon Defendant Suppa, Trucchi & Henein.

20 On May 15, 2006, this Court held a hearing on the Order to Show Cause. Plaintiff
21 appeared and informed the Court that he had mailed the amended complaints to counsel for
22 Defendant Shaw. Plaintiff asserted that the United States Marshal had failed to complete
23 service upon Suppa, Trucchi & Heinen or, in the alternative, that Defendant Suppa, Trucchi
24 & Henein had waived service of the Complaint.

25 On June 7, 2006, this Court entered an order dismissing Defendant Suppa, Trucchi &
26 Henein, LLP, a California Partnership, without prejudice and referred the case to the
27 Magistrate Judge for a case management conference in an effort to move forward with the
28 claims against the only remaining Defendant Shaw.

1 On July 5, 2006, the Magistrate Judge held a case management conference.

2 On July 11, 2006, the Magistrate Judge issued an order which required that “All
3 discovery, including expert discovery, shall be completed on or before September 25,
4 2006” and that “[a]ll motions, other than motions to amend or join parties, or motions in limine,
5 shall be FILED on or before October 10, 2006.”

6 On October 10, 2006, Defendant filed the motion now before this Court for summary
7 judgment or, in the alternative, for summary adjudication of claims.

8 On November 2, 2006, the Magistrate Judge held a telephonic status conference upon
9 Plaintiff’s request at which Plaintiff stated that he had a number of discovery issues and was
10 considering bringing a motion to compel. The Magistrate Judge ordered that “Plaintiff may
11 submit his motion directly to chambers. If the motion is brought, Defendant shall submit his
12 opposition, also directly to the chambers, within five days of his receipt of the motion.”
13 Document #174. Plaintiff did not file a motion to compel.

14 On December 1, 2006, the Magistrate Judge issued an order denying Plaintiff’s motion
15 to vacate scheduling order. The order stated in part that “Plaintiff has had ample opportunity
16 conduct discovery and build his case. Plaintiff has not brought any motions addressing
17 specific discovery disputes, although the Court allowed him to do so even after the September
18 25, 2006 discovery cut-off.” Docket No. 187, Order at page 2.

19 On December 1, 2006, the Magistrate Judge received a letter from Plaintiff which
20 attached “the full motion, or something close to what I would like to file if granted leave to do
21 so.” Docket no. 187, Order at page 1. In an effort to avoid further unnecessary delay, the
22 Magistrate Judge construed Plaintiff’s letter as a motion to compel.

23 On December 6, 2006, the Magistrate Judge issued an order denying Plaintiff’s motion
24 to compel. The Magistrate Judge stated in part “prior to the present motion, Marin has never
25 attempted to bring a motion to compel before this Court. . . . when allowed to make the
26 motion, Plaintiff took a month to do so . . . Plaintiff previously made essentially the same
27 request in his motion to vacate the current scheduling order. The Court denied that motion for
28 lack of good cause to modify the current deadlines. This case has been pending since 2001.

1 Most recently the discovery cut-off was set for September 25, 2006. Plaintiff has had more
2 than sufficient time to conduct discovery.” Docket No. 187, Order at page 4.

3 On December 26, 2006, Plaintiff filed an objection to the December 1, 2006 order of
4 the Magistrate Judge. Plaintiff contends that the Magistrate Judge acted outside of her
5 jurisdiction by issuing a dispositive order in the discovery matter. Plaintiff further contends
6 that the Magistrate Judge prevented him from filing a motion to compel in July 2006.

7 On December 27, 2006, Plaintiff filed a Notice of Appeal from the ruling of the
8 Magistrate Judge filed on December 1, 2006 and all previous and/or related rulings.

9 **CONTENTIONS OF THE DEFENDANT**

10 Defendant contends that he is entitled to judgment in his favor dismissing Plaintiff’s
11 Second Amended Complaint for legal malpractice and breach of fiduciary duty on the grounds
12 that the Second Amended Complaint does not allege any statements made by Plaintiff to the
13 Defendant which were confidential. Defendant contends that the information that Plaintiff is
14 a reserve soldier who the United States orders to temporary duty allegedly confided to
15 Defendant by Plaintiff was a commonly known fact which Plaintiff has attempted to use to his
16 benefit in a number of unrelated cases. In support of his position, Defendant submits in the
17 record of this case six exhibits from the proceedings in other courts in which Plaintiff’s
18 military classification was detailed in the public record prior to March 2000. Defendant
19 contends that there was public knowledge of Plaintiff’s claim to military security clearance
20 well before the March 2000 meeting alleged in the Second Amended Complaint. Defendant
21 further contends that the alleged confidential information could not be the legal cause of any
22 injury to Plaintiff because Plaintiff has not alleged any facts to suggest that Defendant Shaw
23 knew that Plaintiff was out of town when Plaintiff filed his motion in the state court action or
24 come forward with any evidence to establish that he was injured by the conduct asserted.

25 **CONTENTIONS OF PLAINTIFF**

26 Plaintiff contends that the motion for summary judgment by Defendant Shaw is a repeat
27 of an earlier Rule 12 motion brought by the Defendant Shaw and denied by the Court. Plaintiff
28 further contends that Defendant has failed to meet the standard for summary judgment and that

1 Plaintiff is entitled to further discovery.

2 STANDARD OF REVIEW

3 Summary judgment is appropriate under Rule 56 of the Federal Rules of Civil
4 Procedure where the moving party demonstrates the absence of a genuine issue of material fact
5 and entitlement to judgment as a matter of law. Fed. R. Civ. P. 56(c); *See Celotex Corp. v.*
6 *Catrett*, 477 U.S. 317, 322 (1986). A fact is material when it could affect the outcome of the
7 case under the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248
8 (1986). A party seeking summary judgment always bears the initial burden of establishing
9 the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. The moving party
10 may meet this burden by presenting evidence that negates an essential element of the
11 nonmoving party's case or by demonstrating that the nonmoving party failed to make a
12 showing sufficient to establish an element essential to that party's case on which that party will
13 bear the burden of proof at trial. *Id.* at 322-23. The court views all inferences drawn from the
14 underlying facts in the light most favorable to the nonmoving party. *Matsushita Electric*
15 *Industrial Co. v. Zenith Radio Corporation*, 475 U.S. 574, 587 (1986).

16 When a motion for summary judgment is made and supported as provided in Fed. R.
17 Civ. P. 56, an adverse party "may not rest upon the mere allegations or denials of the adverse
18 party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this
19 rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse
20 party does not so respond, summary judgment, if appropriate, shall be entered against the
21 adverse party." Fed. R. Civ. P. 56(e).

22 APPLICABLE LAW

23 In order prevail on a claim for breach of the attorney client privilege, a plaintiff has the
24 burden to demonstrate that privilege applies to the information in question. *United States v.*
25 *Gann*, 732 F.2d 714, 723 (9th Cir.), *cert denied*, 469 U.S. 1034 (1984). To have the privilege
26 apply, the plaintiffs must prove that: "(1) Where legal advice of any kind is sought (2) from
27 a professional legal advisor in his capacity as such, (3) the communications relating to that
28 purpose, (4) made in confidence (5) by the client, (6) are at [the client's] instance permanently

1 protected (7) from disclosure by himself or by legal advisor (8) except that the protection may
 2 be waived . . .” *United States v. Ladof*, 591 F.2d 36, 38, (9th Cir. 1979) quoting 8 Wigmore,
 3 Evidence § 2292 (McNaughton Rev. 1961). The privilege does not extend beyond the
 4 substance of the client’s confidential communication to the attorney and facts which an
 5 attorney receives from a third party about a client are not privileged. *Matter of Fischel*, 557
 6 F.2d 209, 212 (9th Cir. 1977).

7 In order to prevail on a claim for breach of fiduciary duty Plaintiff must demonstrate
 8 the existence of a fiduciary duty, breach of that duty, and damages. *Benasra v. Mitchell*
 9 *Silberberg & Knupp*, 123 Cal.App.4th 1179, 1183 (2004).

10 ANALYSIS

11 1. Jurisdiction

12 On December 27, 2006, Plaintiff filed a Notice of Appeal from the ruling of the
 13 Magistrate Judge filed on December 1, 2006 and all previous and/or related rulings.

14 In *California Department of Toxic Substances Control v. Commercial Realty Projects,*
 15 *Inc.*, 309 F.3d 1113 (9th Cir 2004), the Court of Appeals explained that it is the “general rule
 16 that once a notice of appeal has been filed, the lower court loses jurisdiction over the subject
 17 matter of the appeal. This general rule, however, refers discretely to a loss of jurisdiction over
 18 those aspects of the case involved in the appeal, and is a judge-made doctrine designed to
 19 avoid confusion and waste of time that might flow from putting the same issues before two
 20 courts at the same time. The divestment rule, therefore, is a rule of judicial economy and not
 21 one that strips the district court of subject matter jurisdiction.” *Id.* at 1120, 1121. (citations
 22 and quotation marks omitted).

23 Rule 4 of the Federal Rules of Appellate Procedure provides for an appeal as a matter
 24 of right after judgment has been entered. While there are provisions for an appeal prior to a
 25 final judgment, such as Fed. R. Civ. P 54(b), there are no exceptions which would apply in this
 26 case. Plaintiff’s notice of appeal from a order denying relief in a pretrial matter by the
 27 Magistrate Judge is premature. Delay in considering the Defendant’s motion for summary
 28 judgment will unnecessarily extend this case which has been pending for over five years and

1 will not advance any rule of judicial economy. Since the district court is not stripped of subject
2 matter jurisdiction, this Court concludes that it is in the interest of justice to resolve
3 Defendant's motion for summary judgment.

4 **2. Motion for Summary Judgment**

5 The Second Amended Complaint alleges that Defendant Shaw used confidential
6 information obtained in a meeting between Plaintiff and Defendant to an advantage in
7 unrelated action. The confidential information alleged is described in the complaint as
8 follows:

9 During [the March 2000] meeting, plaintiff confided information to defendant
10 that is not generally known among the legal field in San Diego, nor the
11 community at large, to wit: (a) the plaintiff is a reserve soldier with a record
12 involving classified military duty which the United States has a history of
13 refusing to confirm; (b) because the United States orders plaintiff to temporary
14 duty in other states; if opposing counsel do not allow for extensions of time to
15 respond to motions as is the courtesy, California judges have and will punish
16 plaintiff for missing hearings; c) because plaintiff's mail to different duty
17 locations takes so long, plaintiff does not even receive mail for weeks or months
18 after a court issues any order, so if any defendant wanted to destroy any case
19 against plaintiff, all the defendant has to do is make any motion to shorten time
20 to rule and the case will be over before plaintiff gets off duty and even receives
21 mail.

22 Second Amended Complaint at paragraph 6. The complaint alleges "at the time of the March
23 2000 meeting, plaintiff was threatened with or had actually been found in contempt by Judge
24 Wickersham for plaintiff's request to extend time on a court deadline followed by plaintiff's
25 refusal to submit his entire classified military record to Judge Wickersham. Plaintiff also had
26 another active case, Marin v. HFC, in which the state judge was refusing additional extensions
27 of time and needed an attorney for that one, confiding that the HFC judge may not believe
28 plaintiff with no support from federal offices." Second Amended Complaint at paragraph 7.
The complaint alleges that Shaw became counsel of record for HFC and "used the confidential
information against plaintiff, to wit: instead of agreeing to extend time as a courtesy as is
normal in the first instance with any attorney in the community, Mr. Shaw waited until
Plaintiff was away on his military duty, and then made a motion for attorney fees." Second
Amended Complaint at paragraph 11. The complaint alleges that Plaintiff did not respond to
the motion for attorney fees and that the Court awarded fees "in excess of \$27,000 as claimed

1 attorney fees in about March 2001; and assessed an appellate charge as well, and the state court
2 judge published an order suggesting plaintiff was a professional liar.” Second Amended
3 Complaint at paragraph 12.

4 Plaintiff’s allegations in the complaint that “California judges have and will punish
5 plaintiff for missing hearings” and that “any defendant wanted to destroy any case against
6 plaintiff, all the defendant has to do is make any motion to shorten time to rule and the case
7 will be over before plaintiff gets off duty and even receives mail” are not any manner of
8 confidential information. Parties who miss hearings and do not respond in a timely manner
9 suffer the consequences of as a result of the application of court rules. Any consequence of
10 the application of time limits by the court to the detriment of a litigant is not caused by the
11 opposing attorney and cannot form the basis of a legal malpractice or breach of fiduciary duty
12 action.

13 In support of his motion for summary judgment, Defendant Shaw provides court records
14 from five proceedings prior to March 2000 which refer specifically to Plaintiff’s claims of
15 military service, and Plaintiff’s claims that the military would not provide correct information
16 or access to his records. See *Request for Judicial Notice*, Exhibits A through E. Defendant
17 has come forward with evidence to show that Plaintiff’s assertion in the complaint that it is not
18 generally known that he “is a reserve soldier with a record involving classified military duty
19 which the United States has a history of refusing to confirm” was referenced in the public
20 record on a significant number of occasions and cannot support a claim of confidential
21 information. The Court concludes that Defendant has come forward with evidence and
22 argument which support his position that Plaintiff could prove no set of facts which could
23 entitle him to prevail on his claims of breach of fiduciary duty and legal malpractice. Pursuant
24 to Fed. R. Civ. P 56, the burden shifts to Plaintiff, the non-moving party, to come forward with
25 specific facts showing that there is a genuine issue for trial. Plaintiff has not come forward
26 with any evidence to support his claim that he conveyed confidential information to Defendant
27 which resulted in damage. In response to Defendant’s motion for summary judgment, Plaintiff
28 submits no evidence to support his claims; and asserts that the issue before the Court was

1 decided in a prior order and that he has not had an adequate opportunity to conduct discovery.

2 In the prior order denying Defendant Shaw's motion to dismiss filed on October 15,
3 2003, this Court found that the allegations of damages in the original Complaint were adequate
4 to satisfy the jurisdictional amount and that "a legally cognizable relationship" could exist
5 between the Plaintiff and Defendant Shaw even though Defendant Shaw never represented the
6 Plaintiff. Docket No. 30, Order at page 4. This prior ruling does not satisfy Plaintiff's burden
7 to come forward with some evidence to support his claims. Plaintiff further contends that
8 summary judgment should not be granted because he has not had adequate time for discovery.

9 On June 7, 2006, this Court referred the matter to the Magistrate Judge to allow Plaintiff
10 an additional opportunity to address his discovery issues. On December 1, 2006, the
11 Magistrate Judge stated that "Plaintiff has had ample opportunity conduct discovery and build
12 his case. Plaintiff has not brought any motions addressing specific discovery disputes, although
13 the Court allowed him to do so even after the September 25, 2006 discovery cut-off." Docket
14 No. 185, Order at page 2. Pursuant to the provisions of 28 U.S.C. § 636(b)(1), the district
15 judge "may designate a magistrate judge to hear and determine any pretrial matter pending
16 before the court" with certain exceptions none of which apply to the discovery matters in this
17 case. The Magistrate Judge was specifically designated by this Court to resolve pretrial
18 matters against the remaining Defendant Shaw. Docket No. 161, Order at page 6. This Court
19 may reconsider any pretrial matter "where it has been shown that the magistrate judge's order
20 is clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A). Plaintiff has failed to
21 demonstrate that the December 1, 2006 order of the Magistrate Judge is clearly erroneous or
22 contrary to law or that he is entitled to any further delay pursuant to Fed. R. Civ. P. 56(f).

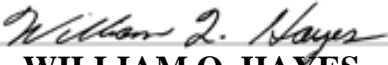
23 Plaintiff filed the Complaint against Defendant Shaw on July 31, 2001. In the
24 intervening five and a half years, Plaintiff filed two amended complaints adding four
25 Defendants who were subsequently dismissed by order of this Court. Plaintiff has had a
26 pending action against Defendant Shaw for more than five years. Plaintiff has had more than
27 adequate opportunity to conduct discovery and full access to this Court to move to compel
28 discovery. Plaintiff has failed to come forward with any evidence to support his claim that he

1 gave confidential information to Defendant Shaw about his military service or the refusal of
2 judges to extend time which Defendant Shaw utilized to damage Plaintiff. Pursuant to Fed.
3 R.Civ. P. 56(e), the Court concludes that summary judgment is appropriate against Plaintiff
4 and in favor of Defendant Shaw.

5 **CONCLUSION**

6 IT IS HEREBY ORDERED that Plaintiff's objection to the Magistrate Judge's ruling
7 of December 1, 2006 (#191) is denied and the motion for summary judgment (#170) or, in the
8 alternative, for summary adjudication of claims by Defendant Stephen Shaw is granted. The
9 Clerk is directed to enter judgment against Plaintiff dismissing this action.

10 DATED: January 17, 2007

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12 **WILLIAM Q. HAYES**
13 United States District Judge
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